4-28-1981

Re Board of School Trustees, School District No 70 (Alberni) and Canadian Union of Public Employees, Local 727

Innis Christie
Dalhousie University Schulich School of Law

M Mearns

S Tzogeoff

RE BOARD OF SCHOOL TRUSTEES, SCHOOL DISTRICT NO. 70 (ALBERNI) AND CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 727

I. Christie, M. Mearns, S. Tzogeoff. (British Columbia) April 28, 1981.

UNION GRIEVANCE relating to employment of part-time employees.

W. Young and others, for the union.
J. Kinzie and others, for the employer.

AWARD

This arbitration arises out of the implementation by the employer of "Program Chance", the thrust of which is explained in the following excerpts from a schools department circular dated April 21, 1980:

APRIL, 1980

RE: "PROGRAM CHANCE" — REHABILITATION RESOURCES FOR HANDICAPPED CHILDREN

The following policy statement is being released jointly by the Ministries of Education and Human Resources to clarify the intent and implementation of the CHANCE program.

1. The purpose of the CHANCE Program is to provide support services within schools to children with severe mental and/or physical handicaps.

. . . . .

3. Support services are provided by a "personal attendant" to children who require assistance in the classroom with such activities as feeding, mobility, positioning, toileting and medication. Services do not include tutoring or duties which relate wholly or primarily to education or behaviour management.

4. Wherever possible, services are to be provided by one attendant to groups of not less than four and not more than twenty children. Under exceptional circumstances, a Regional Manager may approve groupings of less than four children. Such exceptions will only be made in school districts where there are insufficient numbers of children in need of service.

Mr. Robert Moss, superintendent of schools for the employer, testified generally with regard to the implementation of the programme. Through him a number of documents relevant to funding and the like were introduced. Mr. Moss testified that the employer contracts on a quarterly basis with the Ministry of Human Resources for the funds necessary to pay for the number of personal attendants which they have been able to justify in accordance with the aims of the programme.

The following passages from documents which preceded the circular quoted above are also relevant to this arbitration.

From circular of the schools department dated September 6, 1978:

> 4. Children with special needs who can benefit will be accepted into class with non-educational support, despite mental or physical handicap, provided that support service as required by the Board is provided by:
>
> 4.1 The child's parents or guardians.
>
> 4.2 An agency or volunteer group.
>
> 4.3 Other ministries.
>
> . . . . .
>
> 6. School Boards are not required to provide non-educational support services from their education funds.

A school department circular dated September 26, 1979, explains the CHANCE programme, stating on the first page that "funding will be available to Boards of School Trustees on a contractual basis" and then under "*Procedures for Contracting Services*" states the following:

> 1.5.8 Position descriptions must be developed for all personnel involved in the program and must clearly define functions in detail and designate reporting relationships.
>
> 1.5.9 Program Descriptions should be appended with categories and levels for salary purposes for the non-educational support personnel (sections of the existing union pay schedules for auxiliary employees).
>
> . . . . .
>
> 2.4 Contract stipulates that non-education support personnel provided are to be considered employees of the school district and shall receive salary and benefits commensurate with existing non-educational support personnel in the school district.
>
> 2.5 Contract must stipulate the "time period" contract is in effect.
>
> 2.6 Contract must stipulate schedules of payment to the school district.
>
> 2.7 Contract must stipulate the amount of money contracted, for services rendered.

Mr. Moss testified that in 1980, the employer having decided to take advantage of the CHANCE programme, he realized that the

personal attendants hired under it would come within the union's bargaining unit and, accordingly, met with Mr. William Young, president of the union. Mr. Moss testified that he assumed that personal attendants should be treated the same as teachers' aides and on that basis, without taking any legal or other outside advice, drew up a memorandum of agreement which he proferred to the union and Mr. Young. There was some discussion about the terms of the agreement but none whatever about whether or not personal attendants could be hired on a half-time or part-time basis. Mr. Moss testified that it never occurred to him that they could not be hired on a half-time basis. In that context the following memorandum of agreement was signed by the chairman and secretary-treasurer of the employer and by Mr. Young and a Ms. Forbes on behalf of the union.

MEMORANDUM OF AGREEMENT

RE: PERSONAL ATTENDANT

The parties hereto agree that a new category of "Personal Attendant" shall be approved in the "Agreement" between:

THE BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT NO. 70 (ALBERNI)

AND

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 727

for the years 1980-81.

1. A Personal Attendant will work for six (6) hours per day during the school year, only on days when school is actually in session, to provide personal care for a child or children as provided in the attached job description.
2. The rate of pay shall be the same as that of a "Teacher Aide".
3. All other conditions of the Agreement shall apply.

In accordance with arrangements under the CHANCE programme, eight personal attendants were hired by the employer commencing September 8, 1980, one more was hired effective September 15, 1980, and another effective February 2, 1981. Four of the personal attendants hired in September, Bastin, Evans, Mitchell and Cole, were hired to work three hours per day on each working day. On September 23, 1980, following a meeting of the union, Mr. Young objected to Mr. Moss that it was contrary to the memorandum of agreement, and therefore contrary to the collective agreement between the parties, for personal attendants to work less than six hours per day. The employer maintained its position and on October 10, 1980, the union filed the grievance which has resulted in this arbitration. By October 28th, when the union advised the employer that this matter would be taken to

arbitration, only Bastin and Cole remained on part-time. Subsequently, Bastin was employed for a full six hours a day but on February 2, 1981, Norma Dirom was hired to work three hours per day. Since then she and Cole have continued to work on that basis.

In addition to a declaration with regard to the meaning of the memorandum of agreement and the collective agreement in respect of personal attendants the union requests that Dirom and Cole be paid for an additional three hours per day for each day during which they have worked part-time and that Mitchell, Evans and Bastin be similarly compensated for any work they did part-time after October 14, 1980. The union called Cole and Dirom as witnesses. Each testified that she had been available throughout for six hours' work per day. Neither disputed in any way the documentary evidence put in by the employer. In Ms. Cole's case this consisted of a letter from Mr. J.C. Wright, secretary treasurer of the board, dated September 12th, stating in part: "Your assigned duties for the present time will be at Ucluelet Elementary School, three hours per day, school days only." In the case of Ms. Dirom a similar letter, dated January 19, 1981, stated: "Your assigned duties for the present time will be at C.W. Gray Elementary School, three hours per day, school days only." The testimony of Mr. Moss and, more particularly, Mr. Wright left no doubt that for the past 10 years, and right up to the present, the practice of the board of trustees of School District 70 (Alberni) has been to employ part-time employees in virtually all non-teacher categories, including employment as teacher aides and caretakers and in secretarial and transportation functions. Mr. Moss testified that he and the board did not really favour part-time employment but because of the remote location of some of their schools and the limited amount of support work required in various categories it was often not economical or practical to hire full-time people. Where possible, he testified, the board arranged for the support services in question to be supplied to two different schools by one full-time person rather than two part-time people. The employment of the personal attendants had been approached in this same spirit.

It is in this context that the following relevant provisions of the collective agreement between the parties for the years 1980 and 1981 must be read:

> 10. Labour Management Regulations
>
> (a) *Bargaining Committee*
> A bargaining committee shall be appointed by either party as required.

(b) *Function of Bargaining Committee*
Negotiation of all matters of mutual concern pertaining to rate of pay, hours of work and working conditions shall be referred to the bargaining committee. There shall be no unilateral change in hours of work, change of shifts or the working conditions of an employee until mutually agreed to by both parties.

. . . . .

18. Hours of Work

(a) The thirty-nine and one-half (39.5) hour working week Monday to Friday is to be established policy of the Board for all employees and except as otherwise qualified below, each day shall be of eight (8) or seven and one-half (7.5) continuous hours, as appropriate, except for the interruption of time (not to count as work time) for meals. Each day Monday to Thursday to be eight (8) hours, Friday to be seven and one-half (7.5) hours.

(b) Shifts shall be as follows:

(i) Clerical staff shall work a thirty-seven and one-half (37½) hour week, consisting of seven and one-half (7½) consecutive hours per day, exclusive of meal times, between the hours of 8:00 A.M. and 5:00 P.M., Monday to Friday inclusive

. . . . .

(g) Hours of work for employees working less than full-time shall be mutually agreed upon.

Article 28 provides that to be eligible for medical coverage employees under the collective agreement must work at least one-half time on a regular basis; participation in the dental services plan is available only to employees employed 50% or more of full-time and the long term disability insurance plan applies to employees employed 50% or more of full-time. Schedule "B" to the collective agreement contains the following:

Teachers' Aides

All Teacher Aides will work the same work schedule as classroom teachers six (6) hours per day for school days and may work during any Teachers' Convention Day of Teachers' In-Service Day during the school year.

The undisputed evidence was that the second sentence of art. 10(b) and art. 18(g) were first inserted in the collective agreement for 1975, which was negotiated shortly after the event evidenced by the following letter to the recording secretary of the union from Mr. Wright, the board's secretary treasurer, under date of November 8, 1974:

Re School District No. 70 (Alberni) and Canadian Union of Public Employees, Local #727. — (Section 91(1) — Ref: 261/74

Following the meeting of representatives of the Board and the Union with Mr. E. Hutton, Industrial Relations Officer, Labour Relations Board of British Columbia, to settle a difference arising from an alleged violation of Article 18(b)(i) of the Collective Agreement, i.e. changing a full-time clerical

position to two half-time positions, the parties agreed to the addition of the following clause to the Collective Agreement: —

"It is understood that in future there shall be no unilateral change in the hours of work, change of shifts, or the working conditions of an employee until mutually agreed to by both parties.

"It is further understood that in the event no agreement is reached, then the matter shall be settled by Grievance Procedure."

The Union agreed to allow the two half-time positions created to remain.

We would be pleased to receive your confirmation of the above agreement in writing.

On October 1, 1980, after the union's objection to the hiring of part-time personal attendants and before the filing of the grievance in this matter the union formally objected to the employer against the employment of half-time teachers' aides. Other than the matter evidenced by Mr. Wright's letter of November 8, 1974, and the September, 1980 objection to the employment of half-time teachers' aides, the evidence is that the union has not objected to the employment of part-time people, although the union is always advised by letter when a new employee in the bargaining unit is hired, and such letters indicate if the person is employed for part-time work.

Many, indeed perhaps most, of the part-time employees of the board have been so employed for a number of years, certainly since before 1975, but in virtually every category, not just teachers' aides and personal attendants, part-time people have been hired since 1975.

The issues

The first issue is whether under the memorandum of agreement respecting personal attendants, which the parties agree is to be treated as part of their collective agreement, the employer is precluded from hiring personal attendants on a part-time basis. The memorandum of agreement must be interpreted and applied in light of negotiating history and past practice. The second issue, if the hiring of the personal attendants is found to be a breach of the memorandum of agreement, is "what is the appropriate remedy"?

Decision

Counsel for the employer relied on arbitration decisions to the effect that specification of hours of work in a collective agreement is no guarantee of hours and submitted that the past practice of the parties demonstrates that their intent in setting out hours of work in this collective agreement and in the memorandum of

agreement respecting personal attendants is consistent with those cases. He submitted that reference to half-time employees in the benefits provisions of the collective agreement indicates clearly that part-timers are contemplated. The union, on the other hand, relied upon what it submitted were the clear words of the memorandum of agreement: "A Personal Attendant will work for six (6) hours per day . . .".

The principal authority relied upon by the employer is the decision of a board of arbitration chaired by O.B. Shime in *Re Lumber & Sawmill Workers, Local 2995, and Kokotow Lumber Ltd.* (1970), 22 L.A.C. 48, which held that the parties had not intended a guaranteed work week where they stated in the collective agreement:

> The week for operations shall be five (5) days per week, Monday to Friday inclusive.
>
> The work week for employees shall be fifty (50) hours, ten (10) hours per day, Monday to Friday inclusive.

In reaching that conclusion the *Kokotow* board pointed to the fact that in respect of millwrights there was a specific guarantee of their regular rate of pay for a minimum of 50 hours per week which was not given in relation to other employees, and the board quoted the words of Professor Laskin (as he then was) in *Re U.A.W., Local 458, and Cockshutt Farm Equipment Ltd.* (1959), 9 L.A.C. 324 at p. 326, where he stated [p. 49]:

> . . . in the absence of explicit language, an employer who agrees with the union on a 40 hour 5-day week is not thereby guaranteeing that work will be available accordingly. The very presence of seniority clauses negates such a construction or implication.

I must interject that in the case before us the union did not suggest that there was any guarantee of employment for personal attendants. It simply submitted that if they were to be employed at all it had to be on a six-hour day basis.

The starting point in the arbitral jurisprudence is expressed in Brown and Beatty, *Canadian Labour Arbitration* (1977), para. 5:3100, pp. 209-10:

> . . . in the absence of anything in the agreement to the contrary, arbitrators have confirmed management's right to . . . stagger or reduce the hours of various employees . . . where the agreement expressly stipulated the work schedules to be followed . . . or circumscribe the shifts to which employees could be assigned, it was found that management had forfeited its prerogative to make such changes. Similarly, where the agreement provided for the establishment of shifts only "as mutually arranged", it has been held that management could not unilaterally alter the shift schedule in such a way as to deny to certain employees a paid lunch period that they had historically enjoyed [citing *Re U.S.W., Local 6958, and Pedlar People Ltd.* (1967), 18 L.A.C. 307 (Palmer)].

I have no doubt that when Mr. Moss drew up, discussed and advised the signing of the memorandum of agreement with respect to personal attendants he intended that it should permit the board of school trustees to employ personal attendants on a half-time basis. His testimony in that respect was completely credible. The difficulty from the employer's point of view is that there is absolutely no evidence to indicate what the union's intent was. As the British Columbia Labour Relations Board stated in *University of British Columbia and C.U.P.E., Local 116*, [1977] 1 Can. L.R.B.R. 13 at p. 20, in respect of negotiating history:

> First — and most important — the arbitrator is looking for the mutual agreement of both parties, not the unilateral intentions of the one side. Without some reciprocal assent from the other side, the fact that one party had an intention may indicate no more than what it wished to achieve and it is question-begging to conclude from this evidence alone that its wish has been fulfilled.

In light of the past practice it might at first blush seem unfair to allow the union to insist that the stipulation of six-hour days in the memorandum of agreement precludes the employer from hiring part-timers since it "must have known" what Mr. Moss' thinking was. In fact, however, there is no evidence from which we can attribute to the union the understanding that it was Mr. Moss' intent that the employer would be at liberty to hire part-time personal attendants without the union's consent. The dispute in 1974 which went to the Labour Relations Board indicates that part-time employment was a matter of some concern to the union. The solution of that dispute indicates that the union was prepared to accept part-time employment but wished to have some control over it. Article 10(b) of the collective agreement, particularly when read together with art. 18(g), seems to me to say in the clearest terms that the employer could move away from the established shifts only with the agreement of the union. As the benefit provisions make clear, the collective agreement does contemplate part-time workers but, at least since 1975, only, it appears, with the agreement of the union.

I simply cannot accept Mr. Kinsey's suggested interpretation of art. 10(b); that it relates only to the changing of the hours of an established employee and not to the hiring of a new employee. Collective agreements relate to jobs and functions, not particular employees. To give art. 10(b) the interpretation contended for by Mr. Kinsey is to introduce an element of individual bargaining with new hirees that is quite foreign to the collective bargaining process.

Not only does art. 10(b) require that a change in shift be "mutually agreed" and not be "unilateral", art. 18(g) buttresses this by requiring that where employees do work less than full-time their hours "shall be mutually agreed upon". Clearly, there have been a number of cases after 1975 where this requirement has been breached, in that the company has hired people part-time and then advised the union to that effect, with no objection being taken. Mr. Young suggested that this effectively constituted "mutual agreement". It seems to me that "mutual agreement" contemplates agreement before the change occurs, not after, and that what happened in those cases was simply a failure by the union to assert its rights, a matter to which I return below.

It was suggested that in requiring that the hours of part-time employees "be mutually agreed upon" art. 18(g) simply meant that the employer had an obligation to try to reach an agreement and if none was reached it could then implement whatever hours it saw fit, provided it acted reasonably and in good faith. In support of that proposition we were referred to a recent decision by Dalton Larson as arbitrator between *B.C.I.T. and B.C.I.T. Staff Society*, dated November 15, 1979 (unreported). In so far as the arbitrator in that case made a ruling which supports any such proposition that ruling must be read in light of the complex facts and the complicated provision in the collective agreement there, which he treated as if it were a requirement to consult or negotiate, not a requirement to "mutually agree". The accepted interpretation of a provision by which "mutual agreement" is made a condition of employer action is reflected in the quotation from Brown and Beatty, *Canadian Labour Arbitration* set out above, where they cite Professor Palmer's decision in *Re U.S.W., Local 6958, and Pedlar People Ltd.* (1967), 18 L.A.C. 307. Citing that same award, the authors comment later, in para. 5:3100, p. 213:

> In other agreements, it has been provided that the employer's right to alter its working schedules was conditional upon some mutual agreement being secured with the union and in such a context, failure to obtain the union's consent would render improper any alteration which was made unilaterally by the employer.

I should also point out that in a very recent decision, dated September 17, 1980, Dalton Larson, as chairman of a board of arbitration in an award between *Board of School Trustees of School District No. 22 (Vernon) and Okanagan Valley School Employees Union, Local 523 of C.U.P.E.* [unreported], himself explained the *B.C.I.T.* award. The Vernon collective agreement precluded certain changes in arrangements unless the union was

given notice "and agreement is reached" or the employer acted "in consultation and by agreement with the Union". The award states:

> What the *B.C.I.T.* case did was recognize that the parties to many collective agreements agree to postpone for discussion any number of subject-matters until after the main negotiations without intending any change in the relationship on the failure of those discussions. Perusal of almost any collective agreement will reveal the existence of such clauses. These "discussion clauses" are often negotiated as a compromise in difficult bargaining. They are intended to give either party another opportunity to negotiate something that it was perhaps unable to obtain in the context of full collective bargaining. That party is content under those circumstances with the opportunity to persuade — to gain the ear of the other. In the absence of agreement nothing is intended to change. The parties are free to proceed as if nothing had been said about the matter.
>
> Is that what has happened here? Was art. 32 intended to be a mere "discussion clause"? Does it evince a contentment with the mere opportunity to persuade the employer not to contract the operation of school buses? We think not.
>
> If no agreement on sub-contracting results from the negotiations then the paramount intention of the clause must prevail, namely, that the prohibition against subcontracting continues.

By the same token, bearing in mind the dispute that went to the labour board and engendered the second sentence of art. 10(b) and art. 18(g), I have no doubt that those provisions preclude any change in hours of work established under the collective agreement without the agreement of the union. That is not to say, of course, that the union would not frequently, and perhaps readily, grant its agreement.

What then of the fact that the employer has proceeded between 1975 and 1980 to hire part-time employees, only advising the union after the fact and without any objection by the union? As I pointed out above, Mr. Young suggested that this, in effect, constituted agreement by the union in accordance with the collective agreement. In my view, however, it clearly constituted a failure by the union to object to the hiring of part-time employees without its agreement; a failure by the union to object to the way in which the employer operated in making changes within arts. 10(b) and 18(g). While I have concluded on the basis of clear language and negotiating history that the memorandum of agreement with respect to personal attendants cannot be interpreted as not requiring the union's agreement to the hiring of part-time employees, in light of this practice the union officials, whether or not they addressed their minds to the issue, must surely be fixed with an appreciation of the way Mr. Moss would have approached the wording of the memorandum of agreement. They must be treated as if they had

realized that he expected that he would be able to hire personal attendants on a part-time basis, notify the union afterwards and not receive any adverse reaction. There is no evidence on the basis of which we can conclude that the union officials shared Mr. Moss' intent that they would have no right to object to part-time employment, but we can say that the union is estopped from reasserting its right to prior agreement to part-time employment until it has given the employer fair notice of its intention to reassert that right. In *Re City of Penticton and C.U.P.E., Local 608* (1978), 18 L.A.C. (2d) 307, in a decision written by chairman, Paul Weiler, the B.C. Labour Relations Board stated, at pp. 319-20:

> By and large, Canadian arbitrators have assumed that the parties to a collective bargaining relationship have a broader obligation to each other; in effect, an affirmative duty to alert the other side that its practice under the collective agreement, its interpretation of particular contract provisions, is incorrect and unacceptable...
>
> . . . . .
>
> [The arbitration board in the case under review] erred in assuming that it was compelled instead to follow the judicial conception of estoppel developed for commercial contracts; and for that reason it failed to carry out its statutory mandate (under s. 92 of the Code) to fit the principle of estoppel into the special setting and policy objectives of the world of industrial relations.

In this case, some months after the memorandum of agreement was signed but very shortly after the personal attendants were hired, the union alerted the employer that it was insisting on its right to "mutually agree" before they could be hired part-time. The remedy requested is for compensation dating to October 14th, presumably to give the employer time to react to the grievance filed October 10th. However, even by September 23rd, the date of the union's first objection, the employer was under contract with the Ministry of Human Resources for the hiring of half-time personal assistants, justified by the particular needs of handicapped children in the schools involved. The evidence is that such contracts were "quarterly". Thus, there can be said to have been detrimental reliance by the employer in that it took advantage of the funding on a half-time basis only, for the first quarter of the academic year 1980-81. However, by the time it contracted for funding for Ms. Cole and Ms. Dirom the employer was on notice that the union was going to deny its agreement to any departure from the six-hour shifts set out in the memorandum of agreement and, presumably, could have applied for full-time funding. If such funding were denied, the employer would then have been at liberty to terminate the personal attendant. A potentially, very

sad aspect of this whole dispute is, of course, that the Ministry might have refused, and may in future refuse, to fund full-time personal attendants where there is only a medical justification for a part-timer. The effect might be to deny schooling to a handicapped child in a remote school district.

Nevertheless the result must be that, for Ms. Cole, commencing with the "quarter" (by reference to the periods for which the employer contracted with the Ministry of Human Resources) which next began after October 10, 1980, and for the whole of the employment of Ms. Dirom they must be paid an additional three hours' pay for each day they worked. Any of the other personal attendants hired on a part-time basis who worked part-time in a quarter commencing after October 10th must also be compensated on the same basis.

Conclusion

The memorandum of agreement respecting personal attendants is part of the collective agreement between the parties. Its clear words, interpreted in light of the negotiating history of the parties, preclude the employer from employing personal attendants for less than six hours a day without the agreement of the union. In so far as such people were employed for less than six hours they must be compensated, except for the period during the quarter in which the employer had a contract with the Ministry of Human Resources based on the assumption that the union would accept part-time employment. With respect to part-time employment during that quarter the union is estopped from insisting on the enforcement of the memorandum of agreement.

This board remains seised of this matter so that, if the parties are unable to agree on the precise amount of compensation owing, on the application of either party we will reconvene to settle that issue.

DISSENT (Tzogoeff)

I have read your draft award and although I agree with certain facts, I would dissent on the conclusions that have been submitted.

The question which this board has to answer is whether the school district enshrined a guarantee in para. 1 of the "Personal Attendant" memorandum of agreement (ex. 3). It is my view that this memorandum did not confer a guarantee of six hours' work to the personal attendants. Furthermore, the union has "surprised" the school district by deviating from past practice and to some extent the collective agreement itself.

In your draft, *ante*, p. 135, the matter of "a guarantee of employment for personal attendants" is mentioned. The union in its opening remarks stated that they "will show that the agreements [memoranda of agreements for teachers' aides and personal attendants] contain explicit language which *guarantees* six hours of work per day for personal attendants" (my emphasis).

By supporting the union's contention, I submit that this board would be altering the collective agreement. Consider for the moment the obvious corallory; by arbitral jurisprudence it has been established that "past practice" cannot change or alter the collective agreement itself.

I agree with you that there is no evidence to indicate the union's intention when the personal attendant memorandum was signed. In the absence of the union's comments, pro or con, it would be appropriate to consider past practice when the language of the memorandum (ex. 3) is exactly the same as that for "teachers' aides".

It is noted that the teachers' aides memorandum is part of the current collective agreement, negotiated at the bargaining table. I would suggest that in light of the teachers' aides memorandum and the resultant practice of aides working less than six hours, past practice is consistent with the collective agreement. I submit that it is improper for the union to suggest it and not understand Mr. Moss' intent when the wording for the personal attendant memorandum was a duplicate to that of the teachers' aides.

Ante, p. 136 of your draft, you reference the 1974 dispute regarding part-time employees which was referred to the Labour Relations Board of British Columbia. What was at issue in that matter was the variance of existing working conditions of the then current employees. I would suggest that part-time employment was not the issue — but the variance of existing working conditions.

With respect to what constitutes "individual bargaining" as you suggest, I submit that there was no such element because the employer chose to hire or a new classification of hours other than suggested in the memorandum. Existing working conditions were not changed by hiring part-time personal attendants.

"Mutually agreed", as found in certain clauses of the collective agreement, covers existing working conditions to existing employees — otherwise, why is there an orderly history of hiring part-time employees in various classifications? It is submitted that the union has always asserted its rights with respect to existing employees and conditions, however, the union has never

concerned itself with the hiring of part-timers which was done within the aegis of the collective agreement.

I view, with concern, the union's "surprise" decision to claim it was not mutually agreed with respect to the new classification of personal attendant and the resulting part-time employment of the grieving employees. I suggest this surprise action is "negotiation by ambush" — after the fact. The union's claim that it did not agree to part-time personal attendants should be dismissed, as the history of hiring part-timers has been unopposed and is not in conflict with the current collective agreement.

It bears repeating, that management did not alter existing schedules. I submit that the school board has the right to hire part-time personnel, however, I would agree that the school board cannot take an existing full-time incumbent and declare the classification occupied to be part-time — without the union's consent.

Ante, p. 138, regarding the union's "silence" on the matter of hiring part-time personnel, indicates consent — not a failure as suggested. This is witnessed by the union "allowing" part-time teachers' aides. Why then complain about an established practice — not inconsistent with the collective agreement which contemplates part-time employees and has been reflected in practice?

Surely, this board would be creating an anomaly by saying a person has to be paid six hours' wages for working three hours.

In closing, I would suggest that the union is endeavouring to gain a matter not achieved or contemplated in negotiation — either for the renewal of collective agreements or the execution of the memorandum of agreement concerning personal attendants.

This board cannot deny the right of the school board in hiring part-time employees. I feel that the evidence before this board dictated the union's grievance should fail, due to the failure of the union to prove that the school board was in fact violating the collective agreement. It is not this board's prerogative to establish the work requirements or working conditions as a result of this grievance.

All of the foregoing is respectfully submitted.